

Senate Bill 98

By: Senators Hamrick of the 30th, Mullis of the 53rd, Thomas of the 54th, Heath of the 31st, Staton of the 18th and others

AS PASSED

AN ACT

To amend Titles 16 and 35 of the Official Code of Georgia Annotated, relating to crimes and offenses and law enforcement officers and agencies, respectively, so as to provide the Georgia Bureau of Investigation with the authority to investigate certain offenses against minors, including subpoena power; to change provisions relating to the "Computer Pornography and Child Exploitation Act of 1999"; to provide for a definition; to provide for an effective date; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Title 16 of the Official Code of Georgia Annotated, relating to crimes and offenses, is amended by revising Code Section 16-9-109, relating to disclosure by service providers pursuant to investigations, as follows:

"16-9-109.

(a) Any law enforcement unit, the Attorney General, or any district attorney who is conducting an investigation of a violation of this article or an investigation of a violation of Code Section 16-12-100, 16-12-100.1, 16-12-100.2, or 16-5-90 or Article 8 of this chapter involving the use of a computer, cellular telephone, or any other electronic device used in furtherance of the act may require the disclosure by a provider of electronic communication service or remote computing service of the contents of a wire or electronic communication that is in electronic storage in an electronic communications system for 180 days or less pursuant to a search warrant issued under the provisions of Article 2 of Chapter 5 of Title 17 by a court with jurisdiction over the offense under investigation. Such court may require the disclosure by a provider of electronic communication service or remote computing service of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than 180 days as set forth in subsection (b) of this Code section.

(b)(1) Any law enforcement unit, the Attorney General, or any district attorney may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service, exclusive of the contents of communications, only when any law enforcement unit, the Attorney General, or any district attorney:

- (A) Obtains a search warrant as provided in Article 2 of Chapter 5 of Title 17;
- (B) Obtains a court order for such disclosure under subsection (c) of this Code section;
- or
- (C) Has the consent of the subscriber or customer to such disclosure.

(2) A provider of electronic communication service or remote computing service shall disclose to any law enforcement unit, the Attorney General, or any district attorney the:

- (A) Name;
- (B) Address;
- (C) Local and long distance telephone connection records, or records of session times and durations;
- (D) Length of service, including the start date, and types of service utilized;
- (E) Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
- (F) Means and source of payment for such service, including any credit card or bank account number of a subscriber to or customer of such service when any law enforcement unit, the Attorney General, or any district attorney uses a subpoena authorized by Code Section 16-9-108, 35-3-4.1, or 45-15-17 or a grand jury or trial subpoena when any law enforcement unit, the Attorney General, or any district attorney complies with paragraph (1) of this subsection.

(3) Any law enforcement unit, the Attorney General, or any district attorney receiving records or information under this subsection shall not be required to provide notice to a subscriber or customer. A provider of electronic communication service or remote computing service shall not disclose to a subscriber or customer the existence of any search warrant or subpoena issued pursuant to this article nor shall a provider of electronic communication service or remote computing service disclose to a subscriber or customer that any records have been requested by or disclosed to any law enforcement unit, the Attorney General, or any district attorney pursuant to this article.

(c) A court order for disclosure issued pursuant to subsection (b) of this Code section may be issued by any superior court with jurisdiction over the offense under investigation and shall only issue such court order for disclosure if any law enforcement unit, the Attorney

General, or any district attorney offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of an electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. A court issuing an order pursuant to this Code section, on a motion made promptly by a provider of electronic communication service or remote computing service, may quash or modify such order, if compliance with such order would be unduly burdensome or oppressive on such provider.

(d)(1) Any records supplied pursuant to this part shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(A) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records;

(B) The copy is a true copy of all the records described in the subpoena, court order, or search warrant and the records were delivered to the attorney, the attorney's representative, or the director of the Georgia Bureau of Investigation or the director's designee;

(C) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event;

(D) The sources of information and method and time of preparation were such as to indicate its trustworthiness;

(E) The identity of the records; and

(F) A description of the mode of preparation of the records.

(2) If the business has none or only part of the records described, the custodian or other qualified witness shall so state in the affidavit.

(3) If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, the copy of the records shall be admissible in evidence. When more than one person has knowledge of the facts, more than one affidavit shall be attached to the records produced.

(4) No later than 30 days prior to trial, a party intending to offer such evidence produced in compliance with this subsection shall provide written notice of such intentions to the opposing party or parties. A motion opposing the admission of such evidence shall be filed within ten days of the filing of such notice, and the court shall hold a hearing and rule on such motion no later than ten days prior to trial. Failure of a party to file such motion opposing admission prior to trial shall constitute a waiver of objection to such records and affidavit. However, the court, for good cause shown, may grant relief from such waiver."

SECTION 2.

Said title is further amended by revising Code Section 16-12-100.2, relating to computer pornography and child exploitation prevention, as follows:

"16-12-100.2.

(a) This Code section shall be known and may be cited as the 'Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007.'

(b) As used in this Code section, the term:

(1) 'Child' means any person under the age of 16 years.

(2) 'Electronic device' means any device used for the purpose of communicating with a child for sexual purposes or any device used to visually depict a child engaged in sexually explicit conduct, store any image or audio of a child engaged in sexually explicit conduct, or transmit any audio or visual image of a child for sexual purposes. Such term may include, but shall not be limited to, a computer, cellular phone, thumb drive, video game system, or any other electronic device that can be used in furtherance of exploiting a child for sexual purposes;

(3) 'Identifiable child' means a person:

(A) Who was a child at the time the visual depiction was created, adapted, or modified or whose image as a child was used in creating, adapting, or modifying the visual depiction; and

(B) Who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature or by electronic or scientific means as may be available.

The term shall not be construed to require proof of the actual identity of the child.

(4) 'Sadomasochistic abuse' has the same meaning as provided in Code Section 16-12-100.1.

(5) 'Sexual conduct' has the same meaning as provided in Code Section 16-12-100.1.

(6) 'Sexual excitement' has the same meaning as provided in Code Section 16-12-100.1.

(7) 'Sexually explicit nudity' has the same meaning as provided in Code Section 16-12-102.

(8) 'Visual depiction' means any image and includes undeveloped film and video tape and data stored on computer disk or by electronic means which is capable of conversion into a visual image or which has been created, adapted, or modified to show an identifiable child engaged in sexually explicit conduct.

(c)(1) A person commits the offense of computer or electronic pornography if such person intentionally or willfully:

- (A) Compiles, enters into, or transmits by computer or other electronic device;
- (B) Makes, prints, publishes, or reproduces by other computer or other electronic device;
- (C) Causes or allows to be entered into or transmitted by computer or other electronic device; or
- (D) Buys, sells, receives, exchanges, or disseminates

any notice, statement, or advertisement, or any child's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of offering or soliciting sexual conduct of or with an identifiable child or the visual depiction of such conduct.

(2) Any person convicted of violating paragraph (1) of this subsection shall be punished by a fine of not more than \$10,000.00 and by imprisonment for not less than one nor more than 20 years.

(d)(1) It shall be unlawful for any person intentionally or willfully to utilize a computer on-line service or Internet service, including but not limited to a local bulletin board service, Internet chat room, e-mail, on-line messaging service, or other electronic device, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child or another person believed by such person to be a child to commit any illegal act described in Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency or to engage in any conduct that by its nature is an unlawful sexual offense against a child.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 20 years and by a fine of not more than \$25,000.00; provided, however, that, if at the time of the offense the victim was 14 or 15 years of age and the defendant was no more than three years older than the victim, then the defendant shall be guilty of a misdemeanor of a high and aggravated nature.

(e)(1) A person commits the offense of obscene Internet contact with a child if he or she has contact with someone he or she knows to be a child or with someone he or she believes to be a child via a computer on-line service or Internet service, including but not limited to a local bulletin board service, Internet chat room, e-mail, or on-line messaging service, and the contact involves any matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or

sadomasochistic abuse that is intended to arouse or satisfy the sexual desire of either the child or the person, provided that no conviction shall be had for a violation of this subsection on the unsupported testimony of a child.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than ten years or by a fine of not more than \$10,000.00; provided, however, that, if at the time of the offense the victim was 14 or 15 years of age and the defendant was no more than three years older than the victim, then the defendant shall be guilty of a misdemeanor of a high and aggravated nature.

(f)(1) It shall be unlawful for any owner or operator of a computer on-line service, Internet service, local bulletin board service, or other electronic device that is in the business of providing a service that may be used to sexually exploit a child to intentionally or willfully to permit a subscriber to utilize the service to commit a violation of this Code section, knowing that such person intended to utilize such service to violate this Code section. No owner or operator of a public computer on-line service, Internet service, local bulletin board service, or other electronic device that is in the business of providing a service that may be used to sexually exploit a child shall be held liable on account of any action taken in good faith in providing the aforementioned services.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a misdemeanor of a high and aggravated nature.

(g) The sole fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this Code section shall not constitute a defense to prosecution under this Code section.

(h) A person is subject to prosecution in this state pursuant to Code Section 17-2-1, relating to jurisdiction over crimes and persons charged with commission of crimes generally, for any conduct made unlawful by this Code section which the person engages in while:

(1) Either within or outside of this state if, by such conduct, the person commits a violation of this Code section which involves a child who resides in this state or another person believed by such person to be a child residing in this state; or

(2) Within this state if, by such conduct, the person commits a violation of this Code section which involves a child who resides within or outside this state or another person believed by such person to be a child residing within or outside this state.

(i) Any violation of this Code section shall constitute a separate offense."

SECTION 3.

Title 35 of the Official Code of Georgia Annotated, relating to law enforcement officers and agencies, is amended in subsection (a) of Code Section 35-3-4, relating to powers and duties of the Georgia Bureau of Investigation, by striking "and" at the end of paragraph (8), by replacing the period with "; or" at the end of paragraph (9), and by adding a new paragraph to read as follows:

"(10) Identify and investigate violations of Part 2 of Article 3 of Chapter 12 of Title 16, relating to offenses related to minors."

SECTION 4.

Said title is further amended by revising Article 1 of Chapter 3, relating to general provisions relating to the Georgia Bureau of Investigation, by adding a new Code section to read as follows:

"35-3-4.1.

(a)(1) In any investigation of a violation of Code Section 16-12-100, 16-12-100.1, or 16-12-100.2 involving the use of a computer or an electronic device in furtherance of an act related to a minor, the director, assistant director, or deputy director for investigations shall be authorized to issue a subpoena, with the consent of the Attorney General, to compel the production of electronic communication service or remote communication service records or other information pertaining to a subscriber or customer of such service, exclusive of contents of communications.

(2) A provider of electronic communication service or remote computing service shall disclose to the bureau the:

(A) Name;

(B) Address;

(C) Local and long distance telephone connection records, or records of session times and durations;

(D) Length of service, including the start date, and types of service utilized;

(E) Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) Means and source of payment for such service, including any credit card or bank account number of a subscriber to or customer of such service.

(b) Upon failure of a person without lawful excuse to obey a subpoena, the director, assistant director, or the deputy director for investigations, through the Attorney General or district attorney, may apply to a superior court having jurisdiction for an order

compelling compliance. Such person may object to the subpoena on grounds that it fails to comply with this Code section or upon any constitutional or other legal right or privilege of such person. The court may issue an order modifying or setting aside such subpoena or directing compliance with the original subpoena.

(c) The Attorney General may request that a natural person who refuses to produce relevant matter on the ground that the production of records may incriminate such person be ordered by the court to provide such records. With the exception of a prosecution for perjury, a natural person who complies with the court order to provide such records asserting a privilege against self-incrimination to which he or she is entitled by law shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he or she may testify or produce evidence, documentary or otherwise.

(d)(1) Information obtained pursuant to a subpoena enforced by this Code section shall not be made public or, except as authorized in paragraph (2) of this subsection, disclosed by the director, assistant director, deputy director for investigations, or the director's employees beyond the extent necessary for the enforcement of this Code section.

(2) The director, assistant director, deputy director for investigations, or the director's employees shall be authorized to provide to any federal, state, or local law enforcement agency any information acquired under this Code section in furtherance of a criminal investigation in violation of Code Section 16-12-100, 16-12-100.1, or 16-12-100.2.

(e) As used in this Code section, the terms 'electronic communication service' and 'remote communication service' shall have the same meaning as set forth in Code Section 16-9-92."

SECTION 5.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

SECTION 6.

All laws and parts of laws in conflict with this Act are repealed.